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NO. 83-5165

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

LESTER ZEISLER,

Petitioner,

v.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The
Appellate Court Of Illinois,
Third District

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether evidence introduced at petitioner's state court trial was properly seized by fire investigators under this Court's holding in Michigan v. Tyler.

2. Whether the Illinois Appellate Court properly construed Ill. Rev. Stat. 1981, ch. 127 1/2, § 8 in conformity with this Court's holding in Michigan v. Tyler.

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OPINION BELOW

The opinion of the Illinois Appellate Court, Third District, is reported at People v. Zeisler, 112 Ill. App. 3d 788, 445 N.E.2d 1324 (3d Dist. 1983). The opinion has been submitted to this Court as an Appendix to the Petition for Writ of Certiorari and, therefore, is not contained in this Brief in Opposition.

JURISDICTION

The jurisdiction of this Court is properly invoked under 28 U.S.C. § 1257(3).

STATEMENT OF THE CASE

The opinion of the Illinois appellate court provides a statement of additional facts to supplement the Petitioner's statement. The opinion is included as Appendix A of the Petition for a Writ of Certiorari.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

The respondent respectfully requests this Court to deny the petition for a writ of certiorari to review the judgment of the Illinois Appellate Court, Third District, insofar as petitioner does not raise questions of constitutional proposition that are worthy of review. In seeking a writ of certiorari in this cause, petitioner advances two reasons in support of issuance of the writ. The first issue involves a question of particular application of well-settled decisional law to the facts of the instant case. The second issue involves an interpretation of an Illinois statute. Respondent maintains further review of this case is unnecessary because the decision below does not depart from established precedent. The court below fully considered and correctly decided the questions presented for review. Respondent further maintains that it would not be prudent for this Court to grant certiorari in that the issues herein center around facts peculiar to the case at bar, and would have limited impact on future litigants.

I.

EVIDENCE INTRODUCED AT PETITIONER'S STATE COURT TRIAL WAS PROPERLY SEIZED BY THE FIRE INVESTIGATORS UNDER THIS COURT'S HOLDING IN MICHIGAN V. TYLER.

In the case at bar, both the trial and the appellate courts denied petitioner's motion to suppress evidence seized in a warrantless search pursuant to a post-fire investigation. Petitioner argues that the courts' interpretation and application of Michigan v. Tyler, 436 U.S. 499 (1978) denied him his fourth and fourteenth amendment rights. Respondent submits that the Illinois courts correctly applied this Court's holding in Michigan v. Tyler.

In Tyler, firemen responded to an alarm shortly before midnight. While dousing the flames, a fire lieutenant observed evidence of arson and called a fire marshal and a police detective. They entered the building at approximately 3:30

a.m., but their investigation was hampered by darkness, steam, and smoke. At 9:00 a.m. that morning, they reentered the building and seized certain evidence. Nearly four weeks after the fire, the detective again reentered the building and took photographs.

Deciding that the exigency resulting from the fire was not necessarily extinguished with the last flame, this Court held that "officials need no warrant to remain in a building for a reasonable time to investigate the cause of a blaze after it has been extinguished." Id. at 510. Thus, while on the premises to fight a fire, firemen may seize evidence of arson that is in plain view and may remain on the scene for a reasonable time after the fire is extinguished in order to investigate its cause. Id. at 509-10. Under certain circumstances, fire investigators may reenter the premises after leaving the fire scene, so long as the reentering takes place within a reasonable investigative period. Id. at 511.

In the instant case, an investigation was promptly begun due to the exigency of determining the fire's origin. Earl Niestradt, fire chief of Bushnell, Illinois, testified that he arrived at the fire at approximately 12:35 a.m. along with fellow fire fighters. (C. 336) It took approximately 15 to 20 minutes to get the major portion of the fire under control. The fire fighters then waited until smoke cleared before fighting the rest of the fire. (C. 338) Towards the end of the fire fight, but before the fire was extinguished, Chief Niestradt examined the premises to determine the cause and origin of the fire. After deciding that he was not able to determine the cause and origin, he decided to call the Deputy State Fire Marshal's Office for assistance and did so promptly at 6:30 a.m. that morning. (C. 365-66) He called Mr. Louis Keith Ellis of Good Hope, Illinois. He was told that an investigator would be able to arrive at his location to make an investigation at around noontime. (C. 366-68) Niestradt testified that he did not suspect arson at the time he called the State Fire Marshal's Office. (C. 373)

Fire Investigator Hollis Miller arrived at Niestradt's office at noon and both left immediately for the fire-destroyed premises. (C. 368) Upon their arrival there, they walked around the outside of the premises and then decided to proceed to the State's Attorney's Office in Macomb, Illinois, to get a search warrant. They arrived in Macomb, which was approximately 16 miles from Bushnell, and entailed a 20 to 25-minute ride, and were told by the State's Attorney's Office that no search warrant was needed, so they then returned to the premises in Bushnell. (C. 369-70, 347-48) They entered the premises for the purpose of determining the cause and origin of the fire (C. 352) and remained for five to ten minutes. (C. 370) Miller, at this time, took some photographs and cleared away some debris on the kitchen floor. (C. 258) Miller again thought a search warrant was needed so both again proceeded to Macomb and obtained a search warrant. Upon returning to Bushnell, they again entered the premises. Miller took more photographs, removed tile in the kitchen and front room, and examined the kitchen area, the furnace, the washer and dryer. (C. 372; R. 261-67) They remained in the premises for approximately one hour. (C. 354)

It is clear that under Michigan v. Tyler, Chief Niestradt properly inspected the premises in the early morning hours in light of the exigency of determining the fire's origin. The subsequent entries of Niestradt and State Fire Investigator Miller later that same day were not "clearly detached" from the initial entry but rather were no more than an "actual continuation" of it and within a reasonable time under the circumstances. When Chief Niestradt made an initial and prompt examination of the premises and determined that he did not have sufficient expertise to determine the cause and origin of the fire, he made what the trial court correctly found to be prompt arrangements for assistance. This finding cannot be said to have been manifestly erroneous. Chief Niestradt called the Deputy State Fire Marshal's Office, which

was in a different locale, early the same morning. A state fire investigator arrived only a few hours later at noontime. This continuation of the investigation of the fire was done within a reasonable time and its purpose was not to make a separate search for evidence of crime, but was a continuation of the search to determine the cause and origin of the fire.

Finally, petitioner argues that certiorari should be granted in order for this Court to formulate a rule of law that "once the firemen determine to their satisfaction that no eminent threat of reignition or destruction of evidence exists the exigencies have dissipated and any further intrusion on private property requires a warrant." (Petition for a Writ of Certiorari at 8) This Court in Michigan v. Tyler has explicitly rejected such standard. This Court interpreted the Michigan Supreme Court as stating that "the exigency justifying a warrantless entry to fight a fire ends, and the need to get a warrant begins, with the dousing of the last flame." Id. at 510. This Court then stated that this interpretation was "unrealistically narrow." Id. Justice Stewart extended the exigency exception, holding that officials need no warrant to remain in a building for a "reasonable time to investigate the cause of a blaze after it has been extinguished." Id. at 510.

In the instant case, the return of the fire chief and a state fire investigator to the scene occurred within a reasonable time to investigate and was an actual continuation of the first entry. The appellate court correctly considered the issue as a question of fact to be considered on a case by case basis.

II.

THE ILLINOIS APPELLATE COURT PROPERLY CONSTRUED ILL. REV. STAT. 1981, CH. 127 1/2, § 8, IN CONFORMITY WITH THIS COURT'S HOLDING IN MICHIGAN V. TYLER.

Petitioner advances a second ground in support of his petition for a writ of certiorari: "The lower court rulings here against the petitioner should be set aside because the trial and appellate courts' reliance on Illinois Revised

Statutes 1981, Chapter 127 1/2, Paragraph 8, directly conflicts with the requirements of the Fourth and Fourteenth Amendments as interpreted by this Court." (Petition For A Writ of Certiorari at 11) Respondent maintains that the basis of the appellate court's decision was not its reliance on the above statute, but rather its application of Michigan v. Tyler to the facts in the case at bar. The court cited the statute as the basis of fire officials' authority to investigate the cause and origin of fires. People v. Zeisler, 112 Ill. App. 3d 788, 793, 445 N.E.2d 1324, 1327 (3d Dist. 1983). Then the appellate court went on to consider the officials' actions in light of Michigan v. Tyler. Where a decision of this Court directly controls this case and the application of recent decisional law would result in affirming the decision below, no purpose would be served by granting review in the case at bar.

C O N C L U S I O N

In view of the foregoing reasons, respondent respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

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